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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2019

MAILMAN DEVELOPMENT CORPORATION
and GAC CORPORATION

Petitioners,

v.

CITY OF HOLLYWOOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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July 15, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

That petitioners MAILMAN DEVELOPMENT CORPORATION and GAC CORPORATION respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in this proceeding on April 17, 1974.

OPINION BELOW

The opinion of the Supreme Court of Florida, which is reported at 293 So.2d 717, appears in Appendix I hereto. The opinion rendered by the District Court of Appeal, Fourth District of Florida, which is reported at 286 So.2d 614, appears in Appendix II hereto.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 17, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Where a Court is faced with a municipal zoning ordinance which is so restrictive as to amount to a taking of property, must the Court strike the ordinance down or may it alternatively offer to permit the ordinance to stand subject to the payment of compensation for inverse condemnation?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America the pertinent provisions of which are:

> *** nor shall private property be taken for public use without just compensation.

and Section 1 of the Fourteenth Amendment thereof:

> *** nor shall any State deprive any person of *** property, without due process of law; . . .

STATEMENT OF CASE

The Petitioners alleged in a complaint in the Circuit Court of Broward County, Florida, that in 1969 they had paid in excess of $37,000,000 to buy some 900 acres of land in that county for development as a residential unit. (All of these factual allegations are summarizied from the complaint because there has been no trial in the court of first instance.)

Then, after the purchase in 1969 and prior to March of 1972, petitioners expended in excess of $24,000,000 on improvements, plans, public dedications, purchase

of additional land, interest and taxes for the development. All of this was done while zoning regulations permitted the development.

Next in March of 1972, the City of Hollywood enacted a "density cap" (a limit on the number of residential units allowable per acre) which effectively destroyed the development and deprived the petitioners of substantially all the value of their expenditures from 1969 to March of 1972.

After the "density cap" was enacted, the Petitioners sued the City of Hollywood alleging in one count of the complaint that the Petitioners were entitled to compensation for inverse condemnation resulting from the zoning ordinance imposing the "density cap".

The federal constitutional question regarding increase condemnation was raised by Amended Count V which reads:

AMENDED COUNT V

As a direct and proximate result of the adoption by Defendant of the New Ordinance and the attendant frustration of the Project, the Plaintiff was deprived (a) of the reasonable use of the Property out of all proportion in relation to any value to the Defendant from density limits and (b) of substantially all the value of previous expenditure for acquisition of and improvements on the Property, consequently, Defendant has exercised control over, appropriated, confiscated and condemned Plaintiff's property without just compensation and without due process of law contrary to the Constitution and laws of the United States of America and the State of Florida and the Plaintiff is entitled to have a jury trial to determine its compensation.

The entire extant complaint appears in Appendix III hereto)

The trial court dismissed the count seeking compensation for inverse condemnation (the order appears in Appendix IV hereto) while refusing to dismiss counts alleging general unconstitutionality of the zoning ordinance, unconstitutionality of the ordinance in application to Petitioner's property and claiming the city was equitably estopped from enforcing the zoning ordinance as to petitioner's property. (These latter counts are still pending in trial court and are set for trial later this year).

The Petitioners appealed the dismissal of the inverse condemnation count (the pertinent portions of the assignments of Error appear in Appendix V hereto) and certain other matters to the District Court of Appeal, fourth District of Florida, which Court affirmed the action of the Trial Court. The germane portions of the opinion reads:

> Amended Count V alleged that as a result of the adoption of the new ordinance, appellee-City had in effect taken appellant's property without just compensation thereby entitling appellant to a jury trial to determine its compensation. Under our present constitution, Article X, Section 6, no private property shall be taken except for public purposes and with full compensation to the owner. But there is a clear distinction between the appropriation of private property for public use in the exercise of the power of eminent domain, and the regulation of the use of property under the police power exercised to promote the health, morals and safety of the community. State Plant Board v. Smith, Fla. 1959, 110 So.2d 401. See also, 1 Nichols on Eminent Domain (3rd Ed.) pp. 69-70, Section 14.2(2). We hold that enactment of a zoning ordinance under

the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. Cf., City of Miami v. Romer, Fla. 1952, 58 So.2d 849. If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory (as appellant has alleged in other counts still pending before the trial court), the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.

The Petitioners then filed a Petition for Writ of Certiorari with the Supreme Court of Florida attacking the affirmance by the District Court of Appeal of the dismissal by the trial count of the inverse condemnation count. The Supreme Court of Florida denied that Petition.

REASON FOR GRANTING WRIT

The Petitioners respectfully submit that this petition is especially well suited to serve as a vehicle for resolving the important public question of how to reconcile significant private property rights, with the need for dramatically enlarged use of the police power to protect and enhance the environment, .

Man's demands on the environment have reached a point where urgent regulatory action is necessary to preserve the environment. A perusual of the opinions of this Honorable Court reveal significant recent cases dealing with the environment, e.g. *Sierra Club v. Morton,* 405 U.S. 727; *U.S. v. SCRAP,* 412 U.S. 669; and *Zahn v. International Paper Co.,* 38 L. Ed. 2d 511, No. 72-888.

The exact perimeters of police power action have never been determined, in fact it may be they can never

be definitively determined. As this Honorable Court said in *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594:

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *** There is no set formula to determine where regulation ends and taking begins.

The problem is that Courts now face the dilemma of striking down a needed but oppressive zoning ordinance or letting it stand to the deprivation or even destruction of the property and its owner.

One of the things that makes this case a sound vehicle for determining if there are alternatives to this dilemma is the fact that since this Petition arises from the dismissal of conclusionary allegations in a complaint rather than definitive findings of fact, granting the Petition would not involve the setting of rules and perimeters in this threshold case in a new but important area of the law — use of land control regulations to preserve the environment. See, Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964).

Instead, granting the Petition would merely give the Courts an additional tool with which to assist the municipalities in their efforts to protect the environment. See, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria 44 So Cal. L. R. 1971.

Because of the posture of this case there is no need to concern ourselves here with whether petitioners have, in fact suffered such a destruction of property by the use of the police power and likewise, neither the wisdom

nor the necessity of the ordinance has to be questioned here. The sole issue in this petition concerns whether petitioners should have their day in court on the question of whether they are entitled to compensation for a destruction of property by the use of the police power.

Historically, zoning has been used in America as a method of allocating all of the land to its most appropriate use. Basically a use which would be beneficial to its owner and similar to the surrounding neighborhood or district (*see* generally the discussion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, at 388, 1926). The comment that a ". . .nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard", *ibid,* at 388 contained the implicit notion of full utilization of all land in similar use districts.

Because of the historical practice of allocating a use to all land, and doing it on the basis of similarity of surrounding neighborhoods, case law has centered principally around landowner efforts to get a more valuable zoning.

Thus, on the lower east coast of Florida, as large apartments and hotels came to surround or abut residential properties, the surrounding or abutting apartment or hotel property caused the value of property zoned residential to rise beyond that value which residential zoning supported. This was regarded as justifying an upgrading in the zoning of the residential property to something more valuable than residential. See for example, *Tollius v. City of Miami,* 96 So.2d 122 (Fla. 1957), *Miami Shores Village v. Bessemer Properties, Inc.,* 54 So.2d 108 (Fla. 1951), and *Watson v. Mayflower Property, Inc.,* 177 So.2d 355 (Fla. 2nd D.C.A. 1965). In

effect, similar lands in a given area were considered to be entitled to the same use. In other words, as one's neighbors got the benefits from building large hotels or apartments, the then conventional zoning wisdom said one was also entitled to a zoning change so one could also realize these benefits.

Reduced to their net effect, until very recently most zoning cases have, therefore, really looked primarily at whether someone was going to realize a speculative increase in the value of property by obtaining a variance or rezoning which would make the property more valuable than its then current zoning or permitted use.

This approach led to a concentration of high-rises on the Florida seaboard which supposedly have created density problems. These suppositions have caused some persons to question the desire-for-growth syndrome that had basically motivated Florida's (and the nation's) action since the early 20's.

Where, as in Hollywood, Florida, and countless other cities across the United States, this questioning of growth has led to efforts to block growth, parties such as the Petitioners now unexpectedly find the formerly prevailing situation to be reversed. Zoning case law has traditionally meant that since one's neighbors had realized the full benefits of their land, then all the more reason that one was entitled to realize the benefit of his land. Suddenly Hollywood and many localities have came to feel the situation should be the exact converse. Unless compensation is allowed, this zoning ordinance could mean that since Petitioners' neighbors have realized the benefits of their land, then for that very reason, the Petitioners are not entitled to realize the benefits of theirs.

The reason for this is the fact that the trial court now has only 2 alternatives — overturn the ordinance with possible resultant havoc to the public or uphold the ordinance with possible economic destruction to Petitioners' property. Due process demands that the courts have a middle course.

The Count in the Petitioners' Complaint under consideration does not deal with the wisdom or necessity of the downward change. Instead, Count V addresses itself to the fundamental question of what remedies might be available in testing the economic loss attendant to the policy of reducing intensity of land use.

Because courts were looking at whether the value of property should be upgraded by zoning, and looking at neighboring uses, they never had to seriously address this question. Thus, we should not place an overemphasis on previous definitions of "taking" such as that found in Northcutt v. S.R.D., 209 So.2d 710 (Fla. 3rd D.C.A. 1968).

Of course, granting this Petition would not result perforce in a redefinition of such a "taking" by this Court. Granting this Petition would only mean that the Florida trial court should look at the question of what constiutes a "taking" as to which it could grant alternative relief.

"Zoning with compensation" regulations combining the power of eminent domain with the police power by providing for the payment of damages to a property owner whose property is damaged as a result of the land-use restriction were developed at the end of the 19th century, when some legislatures recognized the need for land-use controls but were unsure of the extent

to which they might impose controls. Anderson, Zoning Law and Practice in New York State § 105. With judicial recognition of zoning without compensation, *Euclid v. Ambler Realty Co.*, supra, as a valid tool for restricting land use, the zoning with compensation technique fell into disuse.

We submit it is now time to judicially, rather than legislatively, examine the question of whether there is a need for a change in this restrictive and harsh approach to zoning law and we submit the constitutional bases for this change exists.

In *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), the United States Supreme Court has said as much:

> Thus the WPB made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a question properly turning upon the particular circumstances of each case.
>
> * * *
>
> In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.

It would seem from the teachings of this case that the test of one's right to compensation for acts under the exercise of the police power is a balancing of two factors: (1) the degree of impact on the property owner, on the one hand, with (2) the degree of need by the community, on the other hand. These, of course, are

fact questions which are not before this Court, but the necessity for trial on them is illustrated by noting that while the plaintiffs are not faced with being temporarily completely out of business (as Central Eureka was), the City of Hollywood by the same token may not be faced with what the nation faced in World War II.

If the density limitation ordinance is reasonable in the sense that it is needed, then why not let the trial court consider whether the whole community should bear the cost of its benefits? This question leads inexorably to the answer that if Petitioners' allegations are correct, and only a trial can so decide, the whole community (including to their proportionate extent — the Petitioners) should bear the cost, because those myriad landowners who are not affected by the density ordinance cannot claim that they have given up something of commensurate value the way *Central Eureka* at page 168 notes the whole nation was sacrificing in World War II.

In short, we say the question on which Petitioners have been denied their day in court is whether the regulation is so onerous that it is a taking which requires compensation but at the same time that the regulation is needed.

As was said in *Pa. Coal Co. v. Mahon,* 260 U.S. 393, in which the court recognized:

> "Government hardly could go on if, to some extent, values incident to property could not be diminished [through the exercise of police power] without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must

> have its limits or the contract and due process clauses are gone. *One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.* So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power. [Emphasis added]. *Id.,* at pp. 413

That is a fact question turning on the particular circumstances of this case which deserve a trial.

In addition, the Draconian approach used in the past for zoning cases, of either allowing the zoning to stand or striking it down poses hard questions at a time when growth is being seriously re-examined—at a time, perhaps, when growth should be seriously re-examined. Such an approach permits no middle ground.

The alternative of offering inverse condemnation can be particularly useful in connection with zoning peculiarly affecting a limited area such as ours, especially where the restrictions may be inordinately harsh when applied to particular property and thus might raise questions as to whether the application constitutes a taking of property without compensation.

One of the reasons that courts seem to shy away from allowing inverse condemnation awards in zoning is a fear that public bodies will be overly cautious and perhaps err in applying zoning if they feel that if the zoning is improper they are going to have to pay compensation to the victims. There is a line of cases which holds that such is not true until such time as the courts

have held the zoning to be improper. *Kirschke v. City of Houston,* 330 S.W.2d 629 (Texas Civ. App. 1959); *Gasque v. Town of Conway,* 8 S.E.2d 871 (South Carolina 1940); *Ellis v. City of West University Place,* 175 S.W. 2d 396 (Texas 1943).

This does not seem to be a bad rule for the reason that legislation of whatever sort is presumptively correct and should be acted on as correct until such time as it has been held by the Court to be improper. *State, ex rel, Atlantic Coast Line R. Co. v. State Board of Equalizers,* 94 So. 681 (Fla. 1922).

We submit, therefore, that a writ of certiorari should be issued in this case and Amended Count V remanded for consideration by the Florida Trial Court as to whether or not there was in fact a taking as alleged and if there were such a taking then the Florida Trial Court would be afforded a tool which would take care of all situations, to-wit: the ability to enter an alternative Order directing the City to revoke the zoning or to go to trial on the issue of compensation as a result of the zoning. See the very ably reasoned dissent in *City of St. Paul v. Chi., St. P., M. & O. R. Co.,* 413 F.2d 762 (8th Cir. 1969).

The result of such a holding would not be to restrict the powers of municipalities to control zoning, but, instead, to add a tool to assist in land use control.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

JOHN R. LAWSON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 3 copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida have been furnished by U.S. Mail prepaid on this _____ day of July, 1974 to Myron Burnstein, Home Federal Tower, 1720 Harrison Street, Hollywood, Florida 33020, Counsel for Respondent, I further certify that all parties required to be served have been served. And 3 copies to Honorable J. Bart Budetti, City Attorney, City Hall, City of Hollywood, Hollywood, Florida.

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